OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

ANGELA GOMEZ

Complainant

v.

UNITED PARCEL SERVICES, INC.

Respondent

Complaint No. 10075
(COL) 71120905 (32611) 12132005
22A-2006-19498C

CHIEF ADMINISTRATIVE LAW JUDGE'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION

RICHARD CORDRAY
ATTORNEY GENERAL

Patrick M. Dull, Esq.
Darlene Fawkes Pettit, Esq.
Assistant Attorneys General
Civil Rights Section
State Office Tower, 15th Floor
30 East Broad Street
Columbus, OH 43215-3428
614 – 466 – 7900

Counsel for the Commission

John M. Stephen, Esq.
Myra L. McKenzie, Esq.
Porter, Wright, Morris & Arthur
41 South High Street
Columbus, OH 43215-6194
614 – 227 – 20000

Counsel for Respondent

Angela Gomez
5012 Lee Road
South Bloomfield, OH 43103

Complainant

ALJ'S REPORT BY:

Denise M. Johnson
Chief Administrative Law Judge
Ohio Civil Rights Commission
State Office Tower, 5th Floor
30 East Broad Street
Columbus, OH 43215-3414
614 – 466 – 6684

INTRODUCTION AND PROCEDURAL HISTORY

Angela Gomez (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (the Commission) on December 13, 2005.

The Commission investigated the charge and found probable cause that United Parcel Services, Inc. (Respondent) engaged in unlawful employment practices in violation of Revised Code Section (R.C.) 4112.02(A).

The Commission attempted, but failed to resolve this matter by informal methods of conciliation. The Commission subsequently issued a Complaint on September 14, 2006.

The Complaint alleged Respondent subjected Complainant to disparate terms and conditions of employment, and placed her on involuntary, unpaid medical leave for reasons not applied equally to all persons without regard to their sex (condition of pregnancy).

Respondent filed an Answer to the Complaint on October 30, 2006. Respondent admitted certain procedural allegations, but denied that it engaged in any unlawful discriminatory practices. Respondent also pled affirmative defenses.

The public hearing was waived by the Commission and Respondent in lieu of stipulated facts.

The record consists of the previously described pleadings; Joint Stipulations of Fact, filed May 25, 2007; and the post-hearing briefs filed by the Commission on June 15, 2007; by Respondent on July 20, 2007; and a reply brief filed by the Commission on July 27, 2007.

FINDINGS OF FACT [1]

1. Complainant filed a sworn charge affidavit with the Commission on December 13, 2005.

2. The Commission determined on July 13, 2006 that it was probable that Respondent engaged in unlawful discrimination in violation of R.C. 4112.02(A).

3. The Commission attempted to resolve this matter by informal methods of conciliation. The Commission issued the Complaint after conciliation failed.

4. Complainant was hired by Respondent on August 22, 2005.

---

[1] Only those stipulated facts deemed relevant by the Administrative Law Judge [ALJ] for the resolution of the legal issues contained herein are included in the Findings of Fact.

5. As a part-time loader, after thirty (30) days at work, Complainant became a member of a bargaining unit exclusively represented by a local chapter of the International Brotherhood of the Teamsters (Teamsters).

6. According to the job description, part-time loaders must be able to, among other things, lift, lower, push, leverage and manipulate equipment and/or packages weighing up to 70 pounds and perform other functions that may be assigned.

7. According to the Collective Bargaining Agreement between Respondent and the Teamsters, employees who are injured on the job are given special treatment.

8. The special treatment for employees injured on the job includes transportation and they are paid their regular hourly rate for certain clinic and/or doctors' visits.

9. Additionally, as part of the special treatment, employees injured on the job are provided Temporary Alternate Work (TAW),

which is designed to provide temporary work opportunities to those employees who are unable to perform their normal work assignments due to an on-the-job injury. Employees are provided their guaranteed hours for the duration of the TAW, provided the work is available.

10. On or about December 9, 2005, Complainant provided Respondent with a physician's note which stated that she had a pregnancy-related, weight-lifting restriction of forty (40) pounds. Thereafter, on December 15, 2005, Complainant provided Respondent with a second physician's note raising the pregnancy-related, weight-lifting restriction to fifty (50) pounds.

11. Because Complainant's restriction prevented her from being able to perform the essential functions of her job, she was placed on an unpaid medical leave after the end of her shift on December 15, 2005.

12. Complainant came to work on December 16, 2005, but Respondent sent her home before she began her shift and advised

her she could not work until her doctor released her from the lifting restrictions.

13. Complainant was able to return to work without restrictions on July 17, 2006, six (6) weeks after giving birth.

CONCLUSIONS OF LAW AND DISCUSSION [2]

All proposed findings, conclusions, and supporting arguments of the parties have been considered. To the extent that the proposed findings and conclusions submitted by the parties and the arguments made by them are in accordance with the findings, conclusions, and views stated herein, they have been accepted; to the extent they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issues presented.

[2] Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

1. The Commission alleged in the Complaint Respondent subjected Complainant to disparate terms and conditions of employment, and placed her on involuntary unpaid medical leave for reasons not applied equally to all persons without regard to their sex (condition of pregnancy).

2. This allegation, if proven, would constitute a violation of R.C. 4112.02, which provides, in pertinent part, that:

> It shall be an unlawful discriminatory practice:
>
> (A) For any employer, because of the ... sex, ... of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

3. The term "because of sex" for the purposes of R.C. 4112.02(A) includes, but it is not limited to, discrimination based upon pregnancy, pregnancy-related illnesses, childbirth, or related medical conditions. R.C. 4112.01(B). This division further provides that:

> Women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work ....

4. The Commission has the burden of proof in cases brought under R.C. Chapter 4112. The Commission must prove a violation of R.C. 4112.02(A) by a preponderance of reliable, probative, and substantial evidence. R.C. 4112.05(G) and 4112.06(E).

5. Federal case law generally applies to alleged violations of R.C. Chapter 4112. *Columbus Civ. Serv. Comm. v. McGlone* (1998), 82 Ohio St.3d 569. Thus, reliable, probative, and substantial evidence means evidence sufficient to support a finding of unlawful discrimination under Title VII of the Civil Rights Act of 1964 (Title VII), as amended by the Pregnancy Discrimination Act (PDA). *Priest v. TFH-EB, Inc. dba Electra Bore, Inc.*, 1998 Ohio App. LEXIS 1384; *See* 42 U.S.C. § 2000e(k).

6. Federal case law is especially relevant in this case because R.C. 4112.01(B) reads "almost verbatim to the Pregnancy Discrimination Act" of 1978. *Id.*

7. Under Title VII case law, the Commission is normally required to first establish a *prima facie* case of unlawful discrimination by a preponderance of the evidence. *McDonnell Douglas Co. v. Greene*, 411 U.S. 792, 5 FEP Cases 965 (1973). The burden of establishing a *prima facie* case is not onerous. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 25 FEP Cases 113, 115 (1981). It is simply part of an evidentiary framework "intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." *Id.*, at 254, 25 FEP Cases at 116, n.8.

8. The proof required to establish a *prima facie* case is also flexible and, therefore, may vary on a case-by-case basis. *McDonnell Douglas*, *supra* at 802, 5 FEP Cases at 969, n.13.

In this case, the Commission may establish a *prima facie* case of sex discrimination by proving that:

(1) Complainant was pregnant;

(2) Complainant was qualified for the position;

(3) Respondent subjected Complainant to an adverse employment action; and

(4) Respondent treated a non-pregnant employee, similar to Complainant in ability or inability to work, more favorably than her.

Ensley-Gaines v. Runyon, 72 FEP Cases 602 (6th Cir. 1996).

9. The Commission established, without dispute, the first three elements of a *prima facie* case of pregnancy discrimination under the framework set forth in *Ensley-Gaines* which uses a modified *McDonnell Douglas* framework.

10. The Commission asserts R.C. 4112.01(B) mandates preferential treatment for pregnant women, analogizing pregnancy discrimination claims with disability discrimination claims brought pursuant to R.C. 4112 where the employer has an affirmative duty to reasonably accommodate a disabled employee.

11. However, this interpretation of R.C. 4112.01(B) has been rejected by the court in *McFee v. Nursing Care Mgt. of Am., Inc.*, (2010) 126 Ohio St.3d. In finding that an employer's uniform length of service requirement is not a *per se* violation of R.C. 4112.02(A) the court reasoned:

> The phrase "treated the same" in R.C. 4112.01(B) ensures that pregnant employees will receive the same consideration as other employees "not so affected but similar in their ability or inability to work." Thus, the statute does not provide greater protections for pregnant employees than nonpregnant employees. (...)
>
> *Citing Tysinger v. Zanesville Police Dept.*, (C.A. 6, 2006), 463 F.3d 569, 575; *accord Mullet v. Wayne-Dalton Corp.*, (N.D. Ohio 4004), 338 F.Supp.2d 806, 811; *Armstrong v. Flowers Hosp, Inc.*, (C.A. 11, 1994), 33 F.3d 1308, 1316-1317, and cases cited therein.

12. Respondent has made a distinction in which employees who are injured on the job are accommodated by receiving light duty work as opposed to employees whose injuries are not work- related and, therefore, are not eligible for an accommodation of light duty work.

13. The Commission focuses on the last element of the *prima facie* case in *Ensley Gaines* to support the assertion that the language "that the employee be similar in his or her ability or inability to work" somehow changes the requirement of proving intent to discriminate with a mandate to give preferential treatment to employees who are experiencing a pregnancy-related disability and need a job accommodation.

14. The *Ensley Gaines* decision actually stands for the following proposition:

> (...) when a Title VII litigant alleges discrimination on the basis of pregnancy in violation of PDA, in order to establish a prima facie case of discrimination, she must demonstrate only that another employee who is similarly situated in her or his ability to work received more favorable benefits.
>
> 100 F.3d 1220, 1226 (6th Cir. 1996).

15. *Ensley Gaines* merely follows the parameters laid out in *McDonnell Douglas* by applying flexibility to the framework of a *prima facie* case of discrimination, creating an inference of intentional pregnancy discrimination.

16. Respondent's policy treats non-pregnant females, males, and pregnant females who are not injured on the job differently than male and female and pregnant female employees who are injured on the job.

> Under [the PDA], the treatment of pregnant women in covered employment must focus not on their condition alone but on the actual effects of that condition on their ability to work. *Pregnant women who are able to work must be permitted to work on the same conditions as other employees; and when they are not able to work for medical reasons, they must be accorded the same rights, leave privileges and other benefits, as other workers who are disabled from working.*
>
> *Mullet v. Wayne Dalton Corp.*, (2004) F. Supp. 2d 806 at 812, *citing Carney v. Martin Luther Home, Inc.*, 824 F.2d 643, 646 (8th Cir. 1987) (quoting S.Rep.No. 95-331, 95th Cong., 1st Sess. 3-4 (1977)) (Emphasis added.)

17. The Commission has not introduced any evidence that Respondent's policy intentionally discriminates against pregnant employees.

18. Neither the language of R.C. 4112.01(B) nor R.C. 4112.02(A) requires employers give preferential treatment to pregnant employees.

RECOMMENDATION

For all of the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint No. 10075.

DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

November 23, 2010